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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 83

GARRETT H. BYRNE, District Attorney for Suffolk County, City of Boston, Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

Appellants,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC.,

Appellees.

On Appeal from the United States District Court for the District of Massachusetts

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS, AS AMICI CURIAE

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TABLE OF CONTENTS

	Page
Interest of *Amici*	1
Statute Involved	2
Statement	3
Questions Presented	4
Summary of Argument	4
Argument	4
Conclusion	12

AUTHORITIES CITED

Cases:

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966) 5

A Quantity of Books v. Kansas, 378 U.S. 205 (1964) 5, 11

Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) 7

Dandridge v. Williams, ___ U.S. ___ (No. 131, O.T. 1969, April 6, 1970) 7

Dombrowski v. Pfister, 380 U.S. 479 (1965) 10, 11

Freedman v. Maryland, 380 U.S. 51 (1965) 5, 7, 9, 10

Ginzburg v. United States, 383 U.S. 463 (1966) 6, 8-9

Grove Press, Inc. v. Maryland State Board of Censors, No. 905, O.T. 1969 3

Marcus v. A Search Warrant, 367 U.S. 717 (1961) 5, 11

Martin v. City of Struthers, 319 U.S. 141 (1941) 7

NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964) 7

NAACP v. Button, 371 U.S. 415 (1963) 10, 11

Redup v. New York, 386 U.S. 767 (1967) 4, 5, 6

Roth v. United States, 354 U.S. 476 (1957) 5

Shelton v. Tucker, 364 U.S. 479 (1960) 7

Stanley v. Georgia, 394 U.S. 557 (1969) 4, 5, 6, 8, 9, 12

Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) 5, 7, 9, 11

Page

Whitney v. California, 294 U.S. 357 (1927) 8

Zwickler v. Koota, 389 U.S. 241 (1967) 9, 11, 12

Statutes:

Mass. Gen. Laws, ch. 272, § 28A 2

Miscellaneous:

Memorandum of ACLU and the Maryland Civil Liberties Union as "Amici", No. 905, O.T. 1969 5

IN THE

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OCTOBER TERM, 1969

No. 1149

GARRETT H. BYRNE, District Attorney for Suffolk County, City of Boston, Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

Appellants,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC.,

Appellees.

On Appeal from the United States District Court for the District of Massachusetts

MOTION FOR LEAVE TO FILE A BRIEF BY THE AMERICAN CIVIL LIBERTIES UNION and the CIVIL LIBERTIES UNION OF MASSACHUSETTS AS AMICI CURIAE

1. The proposed *amici* are organizations dedicated to the preservation and extention of civil liberties, particularly the freedoms protected by the Bill of Rights of the United States Constitution.

2. This case presents questions of the permissible boundaries of state criminal prosecution, on grounds of obscenity, of distributors and exhibitors of motion pictures. The interest of proposed *amici* is to assure that state action in this area be narrowly confined to that which is necessary

to safeguard legitimate state interests. Proposed *amici* maintain that such an approach is necessary to avoid the massive chilling effect on freedom of expression which results from overly broad state proscription of communication on obscenity grounds.

3. The argument of proposed *amici*, that the Court below correctly enjoined enforcement of the Massachusetts statute because that statute was far more restrictive of First Amendment rights than is necessary to protect legitimate state interests, has been made in those terms by no party herein and, on the basis of conversations with appellees' counsel, we believe will not be made in appellees' Brief.

4. This argument is relevant to the disposition of this case because it rationalizes the decision of the Court below on a ground which has repeatedly been utilized by this Court in First Amendment cases challenging state statutes for overbreadth.

5. Appellees have consented to the filing of the attached *amicus* Brief; however, the appellants have advised proposed *amici* that they refuse to consent to its filing.

6. For these reasons, under Rule 42(3) of the Rules of this Court, the American Civil Liberties Union and the Civil Liberties Union of Massachusetts hereby move that this Court issue an order authorizing the filing of the attached proposed Brief *amicus curiae* under Rule 42(2).

Respectfully submitted,

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IN THE

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On Appeal from the United States District Court for the District of Massachusetts

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS, AS AMICI CURIAE

INTEREST OF AMICI

The American Civil Liberties Union ("ACLU") is an organization dedicated to the preservation and extension of civil liberties and, particularly, the freedoms protected by the Bill of Rights of the United States Constitution. The Civil Liberties Union of Massachusetts is an affiliate of ACLU dedicated to the same objectives within the Commonwealth of Massachusetts.

This Brief is filed because this case involves the question of the permissible scope of state restriction upon free expression in the medium of motion pictures. It appears to the *amici* that the exhibition of a motion picture only to adults forewarned of its possible offensiveness is protected by the First Amendment and cannot be made the basis of criminal sanctions. The Massachusetts law in issue imposes criminal sanctions on such exhibition and, thus, unreasonably curtails the freedom of expression and freedom to receive ideas and information which are a vital basis of a libertarian and open society.

In addition, *amici* are concerned that federal courts not, as suggested by Appellants, be forced to abstain from making determinations of the constitutionality of state criminal laws while those laws are being actively used to chill freedom of expression. If there exist some forms of expression which are "obscene" and, therefore, outside First Amendment protection, that Amendment—so as to protect communicators of the nonobscene—at the least requires procedural safeguards against a chilling and burdensome multiplicity of litigation.

STATUTE INVOLVED

Mass. Gen. Laws, ch. 272, § 28A, provides:

> Whoever imports, prints, publishes, sells, or distributes a pamphlet, ballad, printed paper, phonographic record, or other things which are obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image, or description, or buys, procures, receives, or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image, or other thing, for the purpose of sale, exhibition, loan, or circulation, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction.

STATEMENT

A three-judge panel of the United States District Court, District of Massachusetts, in the Order appealed from, preliminarily enjoined prospective enforcement against plaintiffs of Mass. Gen. Laws, ch. 272, § 28A. This ruling was grounded upon a finding that the statute was probably unconstitutional as violative of the First Amendment and that plaintiffs would be irreparably injured if the injunction did not issue. Finally, the District Court held that staying its decision until the Supreme Judicial Court of Massachusetts ruled on the constitutionality of the statute—*i.e.*, abstention—would be improper.

The Massachusetts statute in question makes criminal (penalties: up to five years in jail and/or up to $5,000) the "possession [or] . . . any obscene . . . print, picture, figure, image . . . for the purpose of . . . exhibition . . . ." The plaintiffs (appellees) are exhibitors of motion pictures at two theaters in Massachusetts. They were prosecuted at least twice, convicted once (one plaintiff was sentenced to jail for one year) and threatened with additional prosecutions based upon their theaters exhibiting the motion picture *I Am Curious (Yellow)* only to adults who were forewarned of the picture's possible offensiveness.[1]

QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, a state may prohibit exhibiting a concededly obscene motion picture to adults who are aware of its potential offensiveness.

2. Whether federal courts should, or can, abstain from ruling upon the constitutionality of a state statute, or enjoining the statute's enforcement upon finding of unconstitutionality, when to do so would irreparably injure the First Amendment rights of the plaintiff and the public.

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[1] The alleged obscenity of that motion picture has been the subject of numerous litigations at the federal, state and local levels; the issue is now pending before this Court in *Grove Press, Inc., v. Maryland State Board of Censors*, No. 905, this Term.

SUMMARY OF ARGUMENT

I. The dangers of adult exposure to obscene matter have been narrowly defined by this Court. *Redrup v. New York*, 386 U.S. 767 (1967). The states may regulate on obscenity grounds the distribution and consumption of communicative material only to the extent necessary to meet those dangers. Since those dangers may be effectively cured short of outright prohibition of exhibition of a film to adults, the state statute in issue was correctly found by the Court below to suffer from overbreadth and therefore to violate the First Amendment.

II. The burdens on free expression created by multiple state obscenity prosecutions are immense. Therefore, the federal courts must, wherever the constitutionality of a state obscenity statute is legitimately put in issue, rapidly rule upon that question so as to minimize chilling effect.

ARGUMENT

I.

A STATE MAY NOT PROHIBIT THE EXHIBITION OF OBSCENE MOTION PICTURES TO ADULTS WHO ARE AWARE OF THEIR POTENTIAL OFFENSIVENESS

The Court below held that the Massachusetts statute, by prohibiting the "public" (theater open to the public), but restricted (public forewarned of the film's possible offensiveness and theater policed to exclude minors) exhibition of a motion picture, violated the First Amendment. This finding was grounded upon the reasoning of this Court in *Stanley v. Georgia*, 394 U.S. 557 (1969), which held that a state cannot punish a man's possession or viewing of an obscene film in the confines of his home.

Assuming *arguendo* that a film or printed material may be obscene[2] and, therefore, entitled to less protection under the

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[2]This assumption is contested by *amici* on the ground that the standard for obscenity formulated by this Court is too vague and subjective to satisfy due process requirements and that there is no sound

First Amendment than nonobscene communication, may a state ban the distribution of such materials to adults who are warned of possible offensiveness? *Amici* suggests that this question must be answered "no". *Stanley* recognizes that the First Amendment (not the Fourth Amendment as suggested by appellants and the United States as *amicus*) protects "private" consumption of obscenity. It seems clear that the viewing of a film by forewarned adults in a movie theater is "private" enough, in the sense that none of the dangers which can justify governmental regulation of obscenity are present, to meet the *Stanley* rationale.

The *Stanley* case is the latest in a line of attempts by this Court to define the scope of applicability of *Roth v. United States*, 354 U.S. 476, 485 (1957), which held that the government may restrict the dissemination of obscene *albeit* communicative material because "obscenity is not within the area of constitutionally protected speech or press." The efforts to limit the chilling effect of the *Roth* rule upon First Amendment freedoms have been threefold: (1) obscenity was narrowly defined in *Roth* and has been narrowed even further by such decision as *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413 (1966); (2) procedural safeguards have been spelled out against restrictions upon the distribution and exhibition of books: *e.g., Marcus v. A Search Warrant*, 367 U.S. 717 (1961) and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), and motion pictures: *e.g., Freedman v. Maryland*, 380 U.S. 51 (1965) and *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968); and (3) attempts have been made to spell out the dangers posed by obscenity which justify state prohibition: *e.g., Redrup v. New York*, 386 U.S. 767 (1967), and accordingly circumscribe the constitutionally permissible range of state prohibition, *Stanley*, *supra*.

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reason to place any erotic or scatological communication outside the protections of the First Amendment. See *Memorandum of the ACLU and the Maryland Civil Liberties Union as Amici* in No. 905, this Term.

The ACLU, as *amicus*, has urged this Court in such cases as No. 905, this Term, and *Jacobellis v. Ohio*, 378 U.S. 184 (1964) that obscenity is a concept which cannot be applied to expression in a manner consistent with the requirements of due process and that exclusion of obscenity from First Amendment protection is neither constitutionally nor socially justifiable. However, *amici* will not argue those issues herein, but will confine their analysis to the narrower issues raised by this case.

The second approach, defining procedural safeguards, is pertinent to Part II of this Brief, discussing abstention.

Finally, we address the need for examining the dangers of obscenity which justify relaxation of First Amendment protection. In *Redrup v. New York*, 386 U.S. 767, 769 (1967), this Court carefully and narrowly defined three legitimate interests justifying state limitation on dissemination of obscenity: ". . . a specific and *limited* state concern for juveniles . . . an assault upon individual privacy by publication in a manner so obtrusive as to make it *impossible* for an unwitting individual to avoid exposure to it . . . [and] the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463." [emphasis added]. *Stanley* mentioned only two of those dangers: "obscene material might fall into the hands of children . . . or . . . it might intrude upon the sensibilities or privacy of the general public." 394 U.S. at 567.

As found by the Court below, none of these dangers were present in the distribution of *I am Curious (Yellow)* by appellees and, we maintain, these dangers do not individually or collectively justify outright state prohibition of the exhibition of any motion picture on grounds of obscenity. Therefore, the Court below was correct in its preliminary judgment that state laws which so prohibit motion picture exhibition are unconstitutional.

It is possible to satisfy each of the dangers listed in *Redrup* and *Stanley* by means short of outright proscription of a film and, in the area of First Amendment rights, only the least re-

strictive approach is permissible. See, *e.g.*, *Shelton v. Tucker*, 364 U.S. 479 (1960).

The *Shelton* case involved an Arkansas statute requiring public school teachers to list organizational affiliations. This Court held that that statute "must be viewed in light of less drastic means for achieving the same basis purpose," 364 U.S. at 488.[3] Similarly, in *Martin v. City of Struthers*, 319 U.S. 141, 147 (1941), this Court set aside on First Amendment grounds an ordinance prohibiting all door-to-door solicitors, because the danger of fraud can "be so easily controlled by traditional legal methods . . . ." See also *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964):

> ". . . a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

This "no more restrictive than necessary" approach has also governed this Court's disposition of motion picture censorship schemes designed to ferret out obscenity. In *Freedman v. Maryland*, supra, this Court held that, because of its "potentially chilling effect . . . on protected expression" (380 U.S. at 61), any prior censorship scheme must provide for a "prompt, final judicial decision," (*Id.* at 59), *i.e.*, it must provide the smallest possible restriction of First Amendment rights.[4] See, also, *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968).

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[3] That doctrine was reaffirmed by this Court in *Dandridge v. Williams*, ___ U.S. ___ (No. 131; O.T. 1969, April 6, 1970): "[In] a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of 'overreaching' would be significant and might be crucial. For when otherwise valid governmental regulation sweeps as broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional. See, *e.g.*, *Shelton v. Tucker*, 364 U.S. 479."

[4] Cf. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940): "In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe upon the protected freedom."

The facts of the instant case prove that the outright banning of "obscene" movies is more restrictive than is necessary to protect legitimate state interests. As held by the Court below, the risk that the film will be viewed by juveniles has been handled by policing "the theater . . . so that no minors are permitted to enter." (Appendix ("App."), p. 32). On the other hand, there is no social danger created by adult consumption of obscenity which would justify state prohibition. *Stanley, supra,* 394 U.S. at 566-567:

> ". . . Georgia asserts that exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence.[5] There appears to be little empirical basis for that assertion . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscenity on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."

The danger of intrusion of offensive matter upon adults can be disposed of by advertising or a warning of the nature of the film posted at the theater entrance. The Court below found, and appellants do not deny, that "[p]laintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended." (App. 32).

The "pandering" danger described in *Ginzburg, supra,* is not an issue in this case and can clearly be regulated short of banning the film, notably by prohibiting pandering.[6] As

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[5]Cf. the argument made by appellants herein that the State may ban obscenity on the "assumption" that "visual access to obscene and pornographic stimuli may induce crimes of violence and sexual crimes." (Appellants Brief ("App. Br."), p. 18).

[6]Cf. *Stanley,* 394 U.S. at 566-567: ". . . in the context of private consumption of ideas and information we adhere to the view that '[a]mong free men, the deterents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . *Whitney v. California,* 294 U.S. 357, 378 (1927) (Brendeis, J., concurring)."

Ginzburg demonstrates, obscene pandering need not relate to an independently obscene product. Thus, it makes no sense to ban a product on the vague ground that pandering advertising might be used in its sale or promotion.

Therefore, the Court below correctly applied the reasoning of *Stanley* in finding that the Massachusetts statute was unnecessarily broad in its attempt to protect the public from the dangers of obscenity. This, we suggest, was the underlying rationale of the *Stanley* holding that the First Amendment protects purely private viewing of obscene material—*i.e.*, that so long as the dangers of obscenity are obviated, the First Amendment protects all communication, even the obscene.

II.

FEDERAL COURTS SHOULD NOT ABSTAIN FROM RULING ON THE CONSTITUTIONALITY OF STATE STATUTES WHICH, AS ENFORCED, THREATEN TO ABRIDGE FIRST AMENDMENT RIGHTS

Appellants urge that the Court below erred in refusing to stay its decision until the Supreme Judicial Court of Massachusetts could pass upon the constitutionality of the statute in question, especially since the "statute is fairly susceptible to construction which would readily eliminate the constitutional objection." (App. Br., p. 36). The district court, on the contrary, held that the statute is not "susceptible to a construction which would save it from overbroadness," and that abstention would be improper, citing *Zwickler v. Koota*, 389 U.S. 241 (1967). *Amici* concur with the court below.

There are several reasons why U.S. Courts should not abstain in cases like the instant one: (1) repeated prosecutions of motion picture exhibitors amount to a prior restraint upon exhibition of the films in question, which should be subject to the requirement of a rapid adjudication on the merits, cf. *Freedman* and *Teitel, supra*; (2) the economic burden upon distributors and exhibitors of films which come under attack on obscenity grounds has a chilling effect on First Amendment rights and, wherever possible, should be lessened by

rapid and wide reaching adjudications; and (3) the issue ruled upon by the Court below went to the basic method of regulation clearly spelled out in the statute in question and, therefore, no interpretation of that statute could obviate the constitutional issue.

The way in which state obscenity laws—virtually all of which involve criminal sanctions—are enforced is designed, at once, to create a great deterent to free expression and little protection for persons wishing to communicate matter which raises a colorable argument that it is obscene. This is because prosecutors, as in the instant case, are free to charge a new violation of the law with each showing of a motion picture until the ultimate question of the obscenity of the picture is finally adjudicated by this Court. Such multiple prosecutions, actual or threatened,[7] can have but one effect: inhibiting the free distribution of materials under attack. See *Dombrowski v. Pfister*, 380 U.S. 479, 487. This is what happened to *I Am Curious (Yellow)* in Massachusetts; two prosecutions, one conviction and the threat of additional prosecution resulted in plaintiffs' decision to cease exhibition of the picture—it has not been shown in Massachusetts since November 12, 1969. Thus, despite the absence of the "prompt, final judicial decision" on the film's obscenity required by *Freedman* (380 U.S. at 59), Massachusetts has effectively barred its exhibition.

In addition, multiple prosecutions in one jurisdiction, let alone in many,[8] creates a great economic burden upon distributors and exhibitors of motion pictures. To require that, in order to exercise First Amendment rights, one must have

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[7] "'[T]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . . .' *NAACP v. Button*, 371 U.S. 415, 433." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

[8] Grove Press, the sole United States distributor of *I Am Curious (Yellow)*, is presently participating in some 25 lawsuits in 15 states contesting whether the picture may be exhibited in theaters to adults.

the large financial resources needed to participate in such litigation, is repugnant to the freedom of expression which the First Amendment guarantees. This is implicit in the reasoning of *Dombrowski, supra*, and *Zwickler v. Koota*, 389 U.S. 241 (1967).

The need for procedural safeguards against censorship resulting from multiple obscenity prosecutions is manifest. Without exploring the difficult and delicate problems posed by the definition of such safeguards in cases involving enforcement of a valid criminal statute,[9] this Court has made clear that the federal courts must entertain First Amendment challenges to the constitutionality of those statutes. *Dombrowski v. Pfister, supra; Zwickler v. Koota, supra.*

In *Dombrowski* this Court held that standing to bring such suits is extraordinarily broad

> "because of the '. . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.' *NAACP v. Button, supra*, 371 U.S., at 433. If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." 380 U.S. at 486-487.

For the Court below to have abstained in deference to the courts of Massachusetts would have certainly violated the dictate of this Court in *Zwickler*, "that abstention is not to be ordered unless the state statute is of an uncertain nature and is obviously susceptible of a limiting construction." 389 U.S.

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[9]This Court has indicated the need for such protection; see, *Marcus v. A Search Warrant of Property*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 213 (1964) (Brennan, J. plurality opinion): "[if] seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books;" and *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968).

at 251 (footnote 14). The Court below held that such a "limiting construction" was not possible: "if our interpretation of *Stanley* is correct, we find it difficult to think the Massachusetts statute susceptible to a construction which would save it from overbroadness." (App. 36). This is because the plaintiffs in this case, as in *Zwickler*, 389 U.S. at 249-250, make a "constitutional attack . . . that the statute, although lacking neither clarity nor precision, is void for 'overbreadth' . . . ."

As discussed in Part I of this Brief, "overbreadth" is very much the issue in this case and, no less than in Zwickler, it was "the duty of a federal court to decide the federal question when presented to it." (389 U.S. at 251).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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